RE GOLDEN PALACE MUSICAL HALL SDN. BHD.

[O.C.J. (Peh Swee Chin J.) July 8, 1986]

[Ipoh – Originating Summons No. 31-125-86]

Companies and Corporations – Appointment of receiver – Priority of debts – Royal Customs & Excise claiming priority for taxes payable – Service Tax Act 1975, s.52 – Companies Act 1965, ss. 191 & 292.

The applicant was appointed a receiver of the company in question pursuant to powers contained in a debenture dated November 5, 1983 issued to Kwong Yik Bank Bhd. ("the bank"). The receiver managed to recover from some insurance company a sum of $295,000. The department of Royal Customs & Excise ("the said department") not only claimed a sum of $103,520 being arrears of service tax inclusive of penalty for late payment, but also payment of the same in priority to all other claims including the claim for principal and interest from the bank as debenture holder in the sum of $560,480 72. The receiver sought directions from this court to approve a proposed order of priority at the bottom of which would be the said department.

Held: the claim of the said department is to be paid first before the claim for the said principal and interest of the debenture holder *i.e.* the bank.

ORIGINATING SUMMONS.

J. Devadason for the applicant.

Ahmad Maarof for the Customs Department.

Cur. Adv. Vult.

Peh Swee Chin J.: The applicant was appointed a receiver of the company in question pursuant to powers contained in a debenture dated November 5, 1983 issued to Kwong Yik Bank Bhd. ("the bank").

The receiver managed to get in or recover from some insurance company a sum of $295,000. The department of Royal Customs & Excise not only claimed a sum of $103,520 being arrears of service tax inclusive of penalty for late payment, but also payment of the same in priority to all other claims including the claim for principal and interest from the bank as debenture holder in the sum of $560,480.72. It will be obvious that if the claim for priority over the bank by the said department failed, they would recover nothing as the claim of the bank exceeded the money in the hands of the receiver.

The receiver sought directions from this court to approve a proposed order of priority at the bottom of which would be the said department whose claim, as stated earlier, would come to nought should they fail to secure such priority.

The basis of the said department's claim was section 52, with two subsections, of the Service Tax Act 1975 in words as follows:

"(1)Where a receiver is appointed of the property of a person to whom a licence under section 8 is issued the receiver shall give notice thereof to the Director-General within fourteen days after the appointment being made, and shall before disposing of any of the assets set aside such sum out of the assets as appears to the Director-General to be sufficient to provide for any service tax that is or will thereafter become payable in respect of the taxable services that have been provided or taxable goods that have been sold or provided by that person before the appointment of the receiver.

(2) A person appointed as receiver who fails to give notice to the Director-General within the time specified in subsection (1) or fails to provide for payment of the service tax as required by that subsection shall be personally liable for any service tax that is or shall become payable as aforesaid."

I pause to observe that both parties did not dispute before me that such a service tax inclusive of penalty for late payment was a federal tax, and I have no doubt that it is.

Section 191, with three subsections, says as follows:

"(1)Where a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge or possession is taken by or on behalf of debenture holders of any property comprised in or subject to a floating charge, then if the company isnot at the time in the course of being wound up, debts which in every winding up are preferential debts and are due by way of wages salary vacation leave or superannuation or provident fund payments and any amount which in a winding up is payable in pursuance of section 292(3) or (5) shall be paid out of any assets coming to the hands of the receiver or other person taking possession in priority to any claim for principal or interest in respect of the debentures and shall be paid in the same order of priority as is prescribed by that section in respect of those debts and amounts.

(2) For the purposes of subsection (1) the references in section 292(1)(b), (c), (d) and (e) to the commencement of the winding up shall be read as a reference to the date of the appointment of the receiver or of possession being taken as aforesaid (as the case requires).

(3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors."

Section 191 therefore provides, in the case of appointment of a receiver, for the priority of those debts made preferential on a company being

wound up, over and above the claim for principal and interest in respect of a debenture, even though the company is not being wound up at the time when a receiver is appointed on behalf of a holder of a debenture; in other words, the preferentiality of certain debts consequent on a winding up would apply to the appointment of a receiver but which are the preferential debts and what is their order of priority?

Section 292(1) reads as follows:

"292.(1) Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts –

(a) firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under section 220, the remuneration of the liquidator and the costs of any audit carried out pursuant to section 281;

(b) secondly, all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee not exceeding one thousand five hundred dollars whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding up;

(c) thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;

(d) fourthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding up;

(e) fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencment of the winding up by the company as the employer of any person under any written law relating to employees' superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and

(f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

(2) The debts in each class specified in subsection (1) shall rank in the order therein specified but as between debts of the same class shall rank equally between themselves, and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

(3) Where any payment has been made to any employee of the company on account of wages, salary or vacation leave out of money advanced by a person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid, up to the amount by which the sum in respect of which the employee would have been entitled to priority in the winding up has been diminished by reason of the payment, and shall have the same right of priority in respect of that amount as the employee would have had if the payment had not been made."

It will be noticed that a federal tax mentioned in section 292, though at the bottom of the order of priority, is a preferential debt in a winding up, and could have *ex facie* enjoyed priority over a claim for principal and interest due in respect of a debenture as section 191 expressly states that the list of preferential debts in section 292 should be implemented before such claim for such principal and interest of a debenture holder.

On the appointment of a receiver (as opposed to a winding up), for some obscure reasons, the draftsman seems to have been resolute in excluding a federal tax as a preferential debt. In all the subsections of section 292 of the Companies Act 1965 providing for such preferential debts in the case of winding up, there are references to the winding up of the company or the commencement of such winding up. Section 191, in adopting the same order of priority for the same preferential debts during a winding up for the appointment of a receiver, expressly provides, save in two subsections of section 292, that references to the winding up shall be read as a reference to the appointment of a receiver. By some deliberate omission, these two said subsections which refer, in one, to the claim for costs and expenses of winding up and in the other, to the claim of federal tax, have been excluded expressly from such extension. The result is irresistible that on an appointment of a receiver, these two claims will not be in the list of priority at all.

The status of a federal tax as a preferential debt has thus been deliberately omitted from section 191, and would appear at first not to be such a preferential debt on the appointment of a receiver.

The basis of section 52 of the Service Tax Act 1975 then fell to be considered next. Section 52(1) is couched in peremptory language, such that the receiver must set aside, *before disposing of any of the assets* (the italics is mine), such sum as to be sufficient to pay for the service tax. To so set aside must, in my view, necessarily imply that such sum so set aside will have to be paid out to the said department. An irreconcilable conflict could

be arguably said to have emerged from section 52 of the Service Tax Act 1975 on the one hand, and sections 292 and 191 of the Companies Act on the other hand, on the question of the priority of payment between the service tax and the other claims for priority, notably and including the principal and interest due in respect of the debenture. In my judgment, the answer should be obvious that the earlier Companies Act 1965 must give way to the later Service Tax Act 1975 because this is one of the elementary rules of interpretation of statutes as *lex posterior derogat priori.*

I therefore concluded that the claim of the said department was to be paid first before the claim for the said principal and interest of the debenture holder, *i.e.* the bank.

I feel I ought to mention about the claim for costs and expenses of the receiver for which the receiver had given the first place in his proposed order of preference as set out in the originating summons. For the same reasons that a federal tax has been deliberately excluded as a preferential debt by the deliberate omission of the draftsman to extend to such federal tax such preferential status as described above, the claim by the receiver for preferential status also for his costs and expenses fell to the ground by the same token, disconcertingly perhaps to the receiver herein, but inevitably so. While the service tax was resuscitated by the Service Tax Act as to priority, a receiver's claim of priority for his costs and expenses has not been so provided. The claim of a receiver for his costs and expenses would therefore be primarily a matter between him and those who employ him.

I therefore gave judgment in terms as follows:

"(1) The court declares that the Ketua Pengarah Kastam is entitled to payment in priority to the claim of the debenture holder.

It is further ordered that out of the sum of $295,000 in the hands of the receiver, a sum of £103,520 to be paid to the Ketua Pengarah Kastam.

(2) There will be no order as to costs as between the Ketua Pengarah Kastam and the receiver.

(3) That the receiver be entitled to costs to this application against the debenture holder.

(4) That the receiver be entitled to be paid by the debenture holder the costs of his application and his expenses."

Order accordingly.

Solicitors: *Azman, Davidson & Co.*

BEHN MEYER & CO. (M) SDN. BHD. v. AGROPHARM SDN. BHD. & ORS. (ESKOS PRINTING HOUSE SDN. BHD. & ORS., GARNISHEES)

[A.C.J. (V.C. George J.) June 12, 1986]

[Kuala Lumpur – Civil Suit No. C1944 of 1984]

Civil Procedure – Garnishment proceedings – Order made absolute – Subsequent order made to set aside original order – Whether court has jurisdiction to set aside its own order – Principles applied.

The plaintiffs entered trial judgment against the three defendants for a certain sum. Among various steps taken to recover the judgment sum were garnishment proceedings against, *inter alia,* the Federal Land Development Authority (FELDA). FELDA owed one of the defendants a certain sum of money. At the hearing of the proceedings, the garnishment order nisi was made absolute and a consent order was made. On April 8, 1985, I.C.I. Agriculture (M) Sdn. Bhd., as an intervener, filed an application seeking, *inter alia,* for an order that the garnishment order absolute be set aside. The Senior Assistant Registrar allowed the application and set aside the order absolute. The plaintiffs appealed.

Held, allowing the appeal: (1) in respect of a garnishee order absolute, there is no express or implied rule or principle that allows the court that made the order absolute to alter, vary or set aside the order;

(2) the court had no jurisdiction in the instant case to set aside the order made absolute and therefore that order was reinstated.

Cases referred to:

(1) *Hock Hua Bank Bhd.* v. *Sahari bin Murid* [1981] 1 M.L.J. 143.
(2) *Mullins* v. *Howell* (1879) 11 Ch.D. 763.
(3) *Marshall* v. *James* [1905] 1 Ch. 432.
(4) *Moore* v. *Peachey* (1892) 66 L.T. 198.

APPEAL FROM REGISTRAR'S DECISION.

Francis I. Brigged for the appellants.

Robert A. Lazar for the respondent/intervener.

Cur. Adv. Vult.

V. C. George J.: The plaintiffs entered final judgment against the three defendants for an amount over a million ringgit. Among various steps taken to recover the judgment sum were garnishment proceedings against, *inter alia,* the Federal Land Development Authority (FELDA) who appeared, through one of its officers, before the relevant Senior Assistant Registrar at the hearing of the notice to show cause and upon that officer not disputing the alleged liability of Felda to pay to the first defendant $103,951 the garnishment